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CHARLES ELMORE

Supreme Court of the
United States

OCTOBER TERM, 1948.

No. 799

GRAYLYN BAINBRIDGE CORPORATION,
PETITIONER,

VS.

TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE
OF THE HOUSING EXPEDITER,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT.

✓ WILLIAM G. BOATRIGHT,
Suite 1411 Commerce Building,
Kansas City, Missouri,
Counsel for Petitioner.

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THE EIGHTH CIRCUIT.**

*To the Honorable the Chief Justice of the United States and
the Associate Justices of the Supreme Court of the
United States:*

Graylyn Bainbridge Corporation, a Missouri corporation and petitioner herein, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit affirming a judgment of

the United States District Court for the Western Division of the Western District of Missouri. The judgment affirmed is that a permanent injunction issue ordering and directing petitioner to permit representatives of the Housing Expediter to inspect the housing accommodations it owns and operates at 900-908 East Armour Boulevard, Kansas City, Missouri, and to interview the occupants thereof. The judgment of the Court of Appeals was entered March 24, 1949 (R. 61).

OPINION OF THE COURT BELOW.

The majority opinion of the Court of Appeals along with the dissenting opinion is reported in ____ F. 2d ____ and also appears in the record at pages 54-60.

SUMMARY AND SHORT STATEMENT OF MATTER INVOLVED.

Petitioner owns and operates what is known as the Bainbridge Apartment Hotel at 900-908 East Armour Boulevard, Kansas City, Missouri. The establishment contains 100 rental housing units, 34 of which are single rooms with baths and 66 have kitchenette and dinette facilities in addition to rooms and baths. The establishment is operated as a "furnished service establishment" providing full hotel services to all occupants (R. 28-43). Since June 30, 1947, the effective date of the Housing and Rent Act of 1947, the Bainbridge Apartment Hotel has been decontrolled.

On July 14, 1948, the Housing Expediter filed a complaint in the District Court alleging that petitioner "was engaged in acts and practices which constitute violations of Section 6 of the Rent Regulations" issued pursuant to

the Housing and Rent Acts of 1947 and 1948 "by refusing to admit representatives of the Office of Housing Expediter to said premises located at 900 to 908 East Armour Boulevard, Kansas City, Missouri, for the purpose of making an inspection and interviewing the tenants of said premises and housing accommodations" (R. 1, 2).

The complaint contains no allegation that the housing accommodations referred to therein are controlled housing accommodations under the Housing and Rent Acts of 1947 and 1948. Neither does it contain any allegation of actual or threatened violation of the 1947 and 1948 Acts. It merely alleges violation of Section 6 of the Rent Regulations.

Petitioner answered, alleging that the housing accommodations referred to constitute a hotel (apartment hotel) within the meaning of the 1947 and 1948 Acts and, as such, are decontrolled; that the Expediter has no jurisdiction over said housing accommodations and is not vested with authority to make any administrative determination or finding with respect to the same; that Section 6 of the Rent Regulations issued by him is necessarily and expressly limited to controlled housing accommodations (R. 4, 5); that under both the 1947 Act and the 1948 Act the sole jurisdiction of the District Court to grant injunctive relief is upon a "showing" by the Housing Expediter alleging that the person complained of has engaged in or is about to engage in acts or practices which constitute a violation of the Act which under the provisions of the Act can exist only with respect to controlled housing accommodations.

At the trial the Expediter offered no evidence but stood on the pleadings (R. 25-27), whereupon the District Court announced, "I do not believe the question of control or decontrol is presently before the court, or whether

there is or is not a violation of the Housing and Rent Act of 1947. * * * I believe that all that is before the court here at this time is whether or not the Housing Expediter undertook to inspect the premises in question and whether or not the regulations, * * * issued by the Housing Expediter pursuant to provisions of the Act authorized an inspection to be made. The question of violation * * * I do not consider as being present and before the court. The Act required the administrator to enforce the provisions of the Act, * * * the rent regulations, and I assume that there is no question about their publication * * * 12 F. R. 4331 provides at Section 6 that 'any person who rents or offers for rent or acts as a broker or agent for the rental of housing accommodations and any tenant shall permit such inspection of the accommodations by the Housing Expediter as he may, from time to time, require.' That being a valid regulation issued by the Housing Expediter under the provisions of the Act, I take it that he has the right to make the inspection of any rental property, regardless of the fact whether it is controlled or decontrolled" (R. 26-28).

Petitioner, after moving unsuccessfully to dismiss the complaint on the ground that there is no violation or threatened violation of the Act alleged or proved, requested and was granted permission to make an offer of proof. The proof offered covered in detail all relevant facts showing the nature and character of the establishment and its operation, including those disclosing that it is operated as an apartment hotel, furnishes full hotel services to all occupants and is commonly known, regarded and treated as a hotel, not only by the petitioner and the general public but by the State of Missouri (R. 28-43).

Adhering to his views, the District Court, thereupon, entered judgment ordering and directing petitioner to allow and permit representatives of the Expediter to inspect the housing accommodations in question and to interview the occupants thereof and restraining petitioner from any interference therewith (R. 8, 9). Because it was a matter of "first impression" the District Court stayed the judgment pending appeal (R. 41, 42).

Appeal was duly taken to the United States Court of Appeals for the Eighth Circuit. The majority opinion of that court, admitting that there is neither allegation nor proof that the housing accommodations in question are controlled, takes the view that Section 6 of the Regulations authorizes the proposed inspection and interviewing, notwithstanding Sub-section 2 of Section 1 of the same Regulations expressly provides that the Regulations do not apply to decontrolled housing accommodations. It urges that such view is essential to the performance of the Expediter's duty under the Act. It cites *Woods v. Carol Management Corporation*, 168 F. 2d 791, decided by the Second Circuit as supporting the view.

In the dissenting opinion it is pointed out that the only charge made in the complaint is that the petitioner is guilty of a violation of a regulation which by its express terms does not apply to decontrolled housing accommodations; that the Expediter does not allege that he has any cause, probable or improbable, to believe that the housing accommodations in question are within his jurisdiction as controlled housing accommodations or that petitioner has been guilty of any violation of the Housing and Rent Act of 1947, if perchance the housing accommodations are not decontrolled by the Act. The dissenting opinion further holds that the Expediter is acting "without either complaint, cause or ground for curiosity" and

that *Woods v. Carol Management Corporation, supra*, is not in point.

Upon the majority opinion of the Court of Appeals the judgment of the District Court was affirmed. Mandate of the Court of Appeals has been stayed pending disposition of this petition for certiorari (R. 63).

JURISDICTION.

The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Statutes 937 (28 U. S. C. A., Sec. 344(b)).

STATUTES AND REGULATIONS INVOLVED.

Section 206(b) of the Housing and Rent Act of 1947 (Public Law 388—79th Congress; apparently not reproduced in 1949 Supplementary Pamphlet, Title 50, U. S. C. A.), provides:

“(b) Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage in any act or practice which constitutes or will constitute a violation of sub-section (a) of this section, he may make application to any Federal, State or Territorial court of competent jurisdiction, for an order enjoining such act or practice, or for an order enforcing compliance with such sub-section, and upon a showing by the Housing Expediter that such person has engaged or is about to engage in any such act or practice a permanent or temporary injunction, restraining order, or other order shall be granted without bond.”

Sub-section (a) referred to above, provides:

“(a) It shall be unlawful for any person to offer, solicit, demand, accept, or receive any rent for the use

or occupancy of any controlled housing accommodations in excess of the maximum rent prescribed under section 204."

The Housing and Rent Act of 1948 made no change with respect to the right to injunctive relief except to remove the limitation that injunctive relief could only be granted for a violation of Sub-section (a) of Section 206 and provided that injunctive relief could be granted for any violation of the Act. See Title 50, U. S. C. A. App., Sec. 1896, p. 618, 1949 Supplementary Pamphlet. The precise change was to substitute the words "of any provision of this title" for the words "of Sub-section (a) of this section."

Section 6 of the Rent Regulations for Housing issued by the Expediter provides:

"Sec. 6. Inspection. Any person who rents or offers for rent or acts as a broker or agent for the rental of housing accommodations and any tenant shall permit such inspection of the accommodations by the Housing Expediter as he may, from time to time, require."

Sub-section 2 of Section 1 of the same Rent Regulations provides as follows:

"(2) Decontrolled housing to which this regulation does not apply. This regulation does not apply to the following:

(i) Accommodations in hotels, motor courts, trailers and trailer spaces, and tourist homes. (a) Housing accommodations in a hotel (see definition of hotel in Section 1) which on June 30, 1947, were occupied by persons to whom were provided customary hotel services such as maid service, furnishing and laundering of linen, telephone and secretarial or desk service, use and upkeep of furniture and fixtures, and bellboy service (not necessarily all the types of serv-

ices named need be provided in all cases, as long as enough are provided to constitute customary hotel services usually supplied in establishments commonly known as hotels in the community where they are located); * * *."

QUESTIONS PRESENTED.

(1) Whether the Housing Expediter is entitled to injunctive relief to aid him in inspecting rental housing accommodations and interviewing occupants thereof (obtaining their answers and signatures to questionnaires—the proposed questionnaire appears at pages 11-21 of the record) in the absence of allegation or proof by him that the housing accommodations are controlled housing accommodations and that the owner has engaged or is about to engage in some act or practice which constitutes a violation of the Housing and Rent Act with respect to controlled housing accommodations.

(2) Whether any Federal, State or Territorial court has jurisdiction to grant injunctive relief on a complaint filed by the Housing Expediter in which there is no allegation that the housing accommodations sought to be inspected and whose occupants are sought to be interviewed consist of controlled housing accommodations and in which there is no allegation that the owner has engaged or is about to engage in any act or practice constituting a violation of the Housing and Rent Act and in which the Housing Expediter takes no position one way or the other as to whether the housing accommodations are or are not decontrolled and concerning which he offers no proof.

(3) Whether any Federal, State or Territorial court has jurisdiction to grant injunctive relief to the Housing Expediter to inspect housing accommodations and to interview the occupants thereof where the answer of the de-

fendant alleges that the housing accommodations are decontrolled and offers, and there is received, full proof supporting such allegation, which proof is not challenged by the Expediter.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

- (a) The Court of Appeals has decided an important question of federal law which has not been but should be settled by this court.
- (b) The Court of Appeals has decided an important question of federal law in a manner which contravenes the intent of Congress.

The decision is of ominous concern to owners and operators of all types of hotels, whether they be commercial, transient, residential, apartment or family hotels. It is likewise of grave importance to the owners and operators of other classes of housing accommodations which are decontrolled but which do not fall within the hotel classification. Armed with this decision, the Expediter is in a position to demand and enforce admission to all decontrolled housing accommodations and may at his pleasure inspect the same, interview and interrogate occupants and submit to them for answer and signature *ex parte* questionnaires of the character proposed in the case at bar.

The importance of the decision is further emphasized by the provisions of the Housing and Rent Act of 1949, just passed by the Congress. In that Act Congress has *expressly* extended to the Expediter certain powers of investigation but with this *very important limitation*, namely, that they are to be exercised with respect to "controlled housing accommodations." If the Court of Appeals can

disregard the provisions of the Housing Regulation issued by the Expediter, that they apply only to controlled housing, it is not easy to perceive any logical reason why the Expediter may not also ignore the limiting language of the 1949 Act. The full text of the Housing and Rent Act of 1949 may be found in U. S. Code Congressional Service, Pamphlet No. 3, 1949, page 263.

That the carrying out of an unauthorized inquisitorial procedure of such character is damaging to the owner and operator of decontrolled housing accommodations is obvious. The offer of proof included proof that such an inspection and interviewing inevitably and necessarily creates discord, arouses hostility, gives rise to false impressions, stirs up disputes, and is generally destructive of the established good will and relationship existing between the owner and the occupants (R. 37, 38). Such an unauthorized procedure is especially obnoxious and oppressive when carried on by those who present themselves as representatives of the Federal Government. The proposed acts of the Expediter essentially invade the sanctity of private business, property and rights beyond any authority, expressly or impliedly granted by the Congress. "Nothing short of the most explicit language would induce us to attribute to Congress that intent." *Federal Trade Commission v. American Tobacco Co.*, 264 U. S. 298, 68 L. Ed. 696, 44 S. Ct. 336.

Federal rent control commenced under the Emergency Price Control Act of 1942. Section 922 of that Act (Title 50, App., Sec. 922, U. S. C. A., beginning on page 360 of the permanent volume) included provisions whereby the Administrator was authorized to make studies and investigations, conduct hearings and obtain such information as he deemed necessary and to that end was authorized to require any person to produce books and records pertaining

to rental housing accommodations, and to testify under oath, and in the event of refusal was authorized to seek and to have the aid and assistance of the Federal District Courts. That Act came to an end on June 30, 1947, "except that as to offenses committed, or rights or liabilities incurred, prior to such termination date," the provisions of the Act and the regulations thereunder were to be treated as in force for the purpose of sustaining "any proper suit, action or prosecution with respect to any such right, liability or offense" (Section 901, Emergency Price Control Act, as amended, Title 50, App., Sec. 901, U. S. C. A., p. 187 of 1949 Supplementary Pamphlet).

Following termination of the Emergency Price Control Act of 1942 a new Act was formulated by Congress, the Housing and Rent Act of 1947. It was neither an amendment nor a continuation of the Emergency Price Control Act. It was a new Act called into being two years after cessation of hostilities when, according to official expressions of Congress, it was recognized that rent control of any housing accommodations should be terminated as soon as possible. Under the Housing and Rent Act of 1947 the Office of Housing Expediter (previously established under another Act and for another purpose) was continued and there was vested in the Housing Expediter the duty of administering the Housing and Rent Act of 1947.

No counterpart of Section 922 of the Emergency Price Control Act is found in either the Act of 1947 or of 1948. There is no provision in those Acts authorizing the Housing Expediter to conduct hearings, to subpoena witnesses or records or otherwise to obtain evidence, oral or documentary. Specifically he is not vested with power to make any administrative findings or determinations with respect to whether or not rental housing accommodations are or are not decontrolled under the Acts of 1947 and 1948. The

Housing Expediter so concedes. See his ruling in *In re Berkshire Apartment Company*, issued July 19, 1948, No. RA-V-9, wherein he set aside all findings and orders made by his subordinates as to whether the housing accommodations therein referred to were controlled or decontrolled on the sole ground that jurisdiction to make that determination is vested in the courts and not in the Housing Expediter. The same thing is true under the 1949 Act. The Expediter has no power to make any administrative finding or determination as to whether particular housing accommodations are decontrolled under the 1949 Act any more than under the 1947 and 1948 Acts. His investigative powers expressly granted under the 1949 Act are expressly stated to exist with respect to "controlled housing accommodations."

The Housing Expediter is, of course, not required to accept nor is he foreclosed by the views of the owner and operator of particular housing accommodations as to whether or not the same are decontrolled. If he is of the opinion that particular housing accommodations do not fall within any one of the exempted classifications under the Act and are, therefore, not decontrolled, he is authorized under the Housing and Rent Acts of 1947, 1948 and 1949 to file suit in any Federal, State or Territorial court of competent jurisdiction alleging that the housing accommodations are controlled and that the owner or operator has engaged or is about to engage in acts or practices which constitute a violation of the Act. Such a complaint would properly set in motion a judicial inquiry into the status of the particular housing accommodations and "upon a showing" by the Housing Expediter that the owner or operator is engaged in acts or practices in violation of the Act with respect to controlled housing accommodations, he is entitled to injunctive relief. Such was his procedure in *Woods v. Western Holding Corporation*, decided by the

Court of Appeals for the Eighth Circuit, March 23, 1949, No. 13780, ____ F. 2d ____, wherein upon a review of the legislative history of the Act it was held that the word "hotel," as used by Congress, includes all types of hotels such as transient hotels, residential hotels, apartment hotels and family hotels, and that the housing accommodations involved in that case were apartment hotels and, therefore, decontrolled. The legislative history of the 1949 Act, just enacted by Congress as well as its provisions again confirms the correctness of this view.

But the complaint filed by the Housing Expediter against petitioner proceeds on an entirely different theory than in *Woods v. Western Holding Corporation*, *supra*. The Expediter takes the position, sustained by the District Court and affirmed by the Court of Appeals, that all he has to do to be entitled to receive and obtain injunctive relief is to allege that he has been denied access to rental housing accommodations for the purpose of inspection of same and interviewing of occupants. If the decision is allowed to stand, the inevitable and necessary effect is to extend the Act of Congress to include an authority deliberately withheld.

The majority opinion of the Court of Appeals, in effect, confesses as much. It recognizes that the Rent Regulations issued by the Expediter expressly provide that they do not apply to decontrolled housing accommodations. Nevertheless, it adopts the view that the power to inspect and to investigate in the manner here proposed by the Expediter "is essential to the performance of his duties under the Act." Evidently Congress did not deem them essential for it did not include in the Housing and Rent Acts of 1947 and 1948 the investigative privileges contained in the Emergency Price Control Act and in the 1949 Act expressly limited such investigative privileges as were granted to "controlled housing accommodations." It is cog-

nizant of the legislative provisions needed to invest an administrative agency with the inquisitorial powers here claimed by the Expediter. See *Endicott-Johnson Corp. v. Perkins*, 317 U. S. 501, 63 S. Ct. 339, and *Oklahoma Press Pub. Co. v. Walling*, 327 U. S. 186, 66 S. Ct. 494.

In the absence of appropriate legislative authority, the Expediter must obtain his information in the same manner as other litigants. He has been granted no special privileges in this respect by the Congress and the courts are not at liberty to extend such special privileges by judicial decision. His counsel admitted at the trial that the purpose of the present proceeding was to arm themselves with the instrumentalities of the court to find out "violation that we seek—I mean that we are seeking out" (R. 43, 44). But the Act is plain. The only circumstance under which the Expediter is granted the right to injunctive relief is upon a showing by him that the person complained of has engaged or is about to engage in some act or practice which constitutes a violation of the Act. He has not been extended the right to injunctive relief to aid him in an investigation prior to bringing such a suit. Neither has Congress vouchsafed to him the aid of the courts in obtaining *ex parte* depositions in the form of questionnaires from the occupants. If it is the belief of the Expediter that the Bainbridge is not decontrolled, he can file a petition alleging, either as a fact or on information and belief, that it is controlled and that a violation of the Act exists and proceed to take depositions. Thus the rights of all interested parties are protected in a manner long recognized as essential to the administration of justice, except in those special instances where Congress has thought it necessary in the public interest to grant to administrative agencies powers of investigation prior to litigation.

The plain, simple and obvious fact is that the Expediter's power, jurisdiction and functions under the 1947 and 1948 Acts, as well as under the 1949 Act, are limited to controlled housing. If, in any litigation he initiates, he is met with the contention that the housing involved is decontrolled, then necessarily the court before whom the issue is pending must determine the fact. It cannot lawfully proceed, as here, with a fine disregard for that fundamental fact.

Woods v. Carol Management Corporation, 168 F. 2d 791, is not in point. The housing accommodations there involved were controlled housing accommodations. The court expressly states: "At all times after July 1, 1947, defendant's accommodations were subject to the Controlled Housing Regulation * * * issued pursuant to the Act of 1947." In that case the court was dealing only with the validity and applicability of Section 6 of the housing regulations as applied to controlled housing accommodations. It may be sound doctrine that refusal of the right to inspect controlled housing (under Section 6 of the Regulations) involves a violation of the Act such as would invoke jurisdiction to grant injunctive relief under Section 206(b) of the Act. But that is a wholly different question not now presented. *Woods v. Carol Management Corporation, supra*, holds no more.

Congress evidently entertained doubt of the soundness of *Woods v. Carol Management Corp., supra*, as applied to controlled housing accommodations. Thus, the 1949 Act, Section 206(b), provides, for the first time, that injunctive relief may be had by the Expediter upon a complaint alleging that defendant has engaged or is about to engage in acts or practices constituting either a violation of the Act "or any regulation or order issued thereunder." Of course, any regulation or order issued by the Expediter must be with respect to controlled housing accommodations; otherwise the Expediter would be enabled to "hoist himself by his own petard."

CONCLUSION.

Wherefore, petitioner prays that this court issue its writ of certiorari, directed to the United States Court of Appeals for the Eighth Circuit, to certify to this court for its review the judgment, record and proceedings in the case of *Graylyn Bainbridge Corporation, appellant, v. Tighe E. Woods, Housing Expediter, appellee, No. 13842*, in that court.

Respectfully submitted,

WILLIAM G. BOATRIGHT,
Suite 1411 Commerce Building,
Kansas City, Missouri,
Counsel for Petitioner.